BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Amendment of the Commission's Rule Regarding Applications for Certificates of Convenience and Necessity	)))	No. EX-2018-0189

APPLICATION FOR REHEARING AND REQUEST FOR STAY

Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") (collectively, "Companies"), pursuant to Section 386.500[1] and 4 CSR 240-2.160, seek rehearing and request a stay of the effectiveness of the Final Order of Rulemaking issued by the Missouri Public Service Commission ("Commission" or "PSC") regarding the newly adopted Certificate of Convenience and Necessity ("CCN") Rule, 4 CSR 240-20.045.

In support of this Application for Rehearing and Request for Stay, the Companies state the following:

I. Introduction

1. On August 8, 2018 the Commission issued a Final Order of Rulemaking that adopted a new CCN rule to be promulgated at 4 CSR 240-20.045 under the title of Electric Utility Applications for Certificates of Convenience and Necessity ("Rule"). On that same day the Commission rescinded the existing CCN Rule at 4 CSR 240-3.105, Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity.

2. As for its purpose, the PSC has stated that the "proposed rule outlines the requirements for applications" under Section 393.170.1 and 393.170.2 which request the Commission to grant a CCN "to an electric utility for a service area or to operate or construct an

[1] All statutory references are to the Missouri Revised Statutes (2016), as amended, unless otherwise noted.

electric generating plant, an electric transmission line, or a gas transmission line that facilitates the operation of an electric generating plant." See Order of Rulemaking at 18.

3. Prior to approving the August 8 Final Order of Rulemaking, the Commission published a proposed rule in the *Missouri Register* on May 15, 2018, and received written public comments through June 14, 2018. The PSC conducted a public hearing on June 19 at which only one member of the Commission was present. See Transcript of Proceedings at 1-5 (June 19, 2018). Based upon the written comments and discussions that occurred at the public hearing, a revised CCN rule was circulated by email to certain parties on July 17, 2018, with the request that "feedback" be provided to the Staff of the Commission by 4 p.m. on July 18. The Commission did not schedule a period during which written public comments could be submitted regarding the revisions to the proposed rule. It also did not conduct a public hearing to receive oral comments regarding those revisions. The PSC then approved the Final Order of Rulemaking at its agenda session of August 8, 2018, taking no public comments at that time.

4. The Commission should rehear this matter, and thereafter revoke and rescind its Order of Rulemaking because it is unlawful, unjust, unreasonable, arbitrary and capricious, and constitutes an abuse of discretion for all the reasons set forth below. Furthermore, the Commission should exercise its discretion under Section 386.500.3 and stay the effectiveness of the Rule indefinitely until further consideration is given to these matters.

5. Although certain provisions in the Rule properly seek to clarify the Commission's authority to grant a CCN in light of judicial decisions over the past ten years, much of the it is contrary to law. Moreover, the Rule would create regulatory burdens, impose significant costs, and cause delays in the implementation of infrastructure projects that serve the public interest.

6. Most of the Rule has been drafted without regard to the purpose and language of Section 393.170 where the General Assembly specified the powers granted to the Commission regarding CCNs. Although a public utility must obtain the permission of the Commission before beginning "construction of a gas plant, electric plant, water system or sewer system" under Section 393.170.1, there is nothing in Section 393.170 that requires a utility to obtain the PSC's approval prior to the "operation of an asset," as proposed by the Rule's Section (2)(A)3. There is also nothing in Section 393.170 that extends the Commission's authority to the construction of assets that are not located in Missouri, as proposed by Sections (1)(A)1 and (2)(A)2 of the Rule. Finally, there is nothing in Section 393.170 that requires Commission approval prior to a utility rebuilding, improving or retrofitting a plant that already possesses a CCN, as required by Sections (1)(B)2 and (2)(A)2.

7. The courts have held that the Commission "has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature." State ex rel. Springfield Warehouse & Transfer Co. v. PSC, 225 S.W.2d 792, 794 (Mo. App. K.C. 1949). See Gee v. Department of Social Services, 207 S.W.3d 715, 719-21 (Mo. App. W.D. 2006) (agency exceeded its authority by adding requirements to its regulations contrary to state law).[2] Because the Rule goes far beyond the powers that the General Assembly authorized in Section 393.170, it should be withdrawn.

8. The Commission has a great deal of authority over public utilities, however, it cannot exercise authority that is not provided by statute. "The Commission is purely a creature of statute, and its powers are limited to those conferred by statute, either expressly or by clear

[2] Federal courts agree. FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 161 (2000) (FDA regulations exceeded authority granted by Congress); MCI Telecomm. Corp. v. AT&T, 512 U.S. 218, 228-29 (1994) (FCC's interpretation of law "not entitled to deference" where the agency's rule purporting to "modify" tariff filing requirements went "beyond the meaning that the statute can bear").

implication as necessary to carry out the powers specifically granted." State ex rel. PSC v. Bonacker, 906 S.W. 2d 896, 899 (Mo. App. S.D. 1995) ("Bonacker"), citing State ex rel. Util. Consumers Council of Mo., Inc. v. PSC, 585 S.W.2d 41, 49 (Mo. en banc 1979) ("UCCM").

II. The Rule is Contrary to Section 393.170 which Does Not Grant the Commission Authority to Require a Public Utility to Obtain a CCN Prior to the Operation of an Asset

9. There is no language in Section 393.170 that requires a utility to obtain Commission approval prior to the operation of an asset. Subsection 1 simply states that no electrical corporation "shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission [emphasis added]." See § 393.170.1

10. Similarly, Subsection 2 states that no such corporation "shall exercise any right or privilege under any franchise … without having first obtained the permission and approval of the commission [emphasis added]." See § 393.170.2. In this regard, the utility must verify "that it has received the required consent of the proper municipal authorities." Id.

11. When the Commission exercises its power to grant such permission in a CCN, Section 393.170.3 makes clear that its decision regarding "such construction" under Subsection 1 or "such exercise of the right, privilege or franchise" under Subsection 2 must be "necessary or convenient for the public service." There is no language anywhere in Section 393.170 that gives the PSC jurisdiction to grant a CCN regarding the "operation" of an electric generating plant or other "asset."

12. However, Section (2)(A) of the Rule provides that an "electric utility must obtain" a CCN "prior to … 3. Operation of an asset pursuant to section 393.170.2." Similarly, Section (5) sets forth what a public utility must include in its application "for authorization to operate assets under section 393.170.2." The Rule mandates such an application even though there is no

language in Subsection 2 or any other portion of Section 393.170 that uses the word "operate" or "operation."

13. The Supreme Court recently described the purpose of Subsection 1 "line" certificates and Subsection 2 "area" certificates in Grain Belt Express Clean Line, LLC v. PSC, 2018 WL 3432778 (Mo. en banc, July 17, 2018), rehearing denied (Aug. 21, 2018) ("Grain Belt Express"). It noted that Section 393.170 "sets out two types of CCNs" the Commission may grant, with Subsection 1 granting the PSC "the authority to issue a line CCN to a utility to construct electrical plants." Id. at *2. The Court observed that Subsection 2 "grants the Commission the authority to issue an area CCN for the utility to exercise a franchise and provide retail utility service to a geographic territory." Id. at *2. The Rule never refers to "line" and "area" certificates, despite the Commission's historic use of those terms to describe its statutory authority, and their acceptance by Missouri courts.

14. In its comprehensive review of the cases construing Section 393.170 over nearly 60 years, the Supreme Court never suggested that there is a requirement under Subsection 2 that a public utility obtain PSC permission before beginning to "operate" a plant or other asset. Id. at *2-*3. Instead, the Supreme Court used the terms consistently employed by the appellate courts which speak of obtaining the PSC's permission "to serve a territory" or "the exercise of rights and privileges under a franchise" to provide such service. Id. at *3.

15. Among the cases relied upon by the Supreme Court in Grain Belt Express was State ex rel. Harline v. PSC, 343 S.W.2d 177, 180-83 (Mo. App. K.C. 1960) ("Harline"), where the Court of Appeals considered an argument that Subsection 2 was applicable to "the construction" of a utility asset (a transmission line) because it occurred when the utility exercised

a "right or privilege" under a franchise and that an additional Subsection 2 area CCN was required. The Court of Appeals firmly rejected that view:

> We do not read the statute with that understanding. We view the company's rights and privileges under its corporate franchise as the unitary, indivisible sum of all its corporate powers conferred by the state, merged into the single privilege of operating an electric utility. … If Commission approval were required for all separate acts in the exercise of 'any right of privilege under any franchise,' we envisage its ridiculous application to every conceivable detail incident to business operation.

Id. at 183 (emphasis added).

16. Yet, Section (2)(A)3 of the Rule requires that an electric utility obtain a Subsection 2 area CCN from the Commission for such "separate acts" when it begins to operate an electric generating plant or a gas transmission line that facilitates the plant's operation. As the Harline Court warned, such an interpretation of Section 393.170.2 is the first step in extending the Commission's CCN authority to "every conceivable detail incident to [an electric utility's] business operation." Id.

17. In approving the Rule, the Commission has violated the principle that neither the courts nor administrative agencies may "supply what the legislature has omitted from controlling statutes." Turner v. School Dist., 318 S.W.3d 660, 668 (Mo. en banc 2010). Courts and agencies "may not engraft upon the statute provisions which do not appear in explicit words or by implication from other language in the statute." Wilson v. McNeal, 575 S.W.2d 802, 810 (Mo. App. St. L. 1978). Accord State v. Collins, 328 S.W.3d 705, 709 n.6 (Mo. en banc 2011); Metro Auto Auction v. Director of Revenue, 707 S.W.3d 397, 402 (Mo. en banc 1986) (Director enjoined from practice relating to motor vehicle titles not authorized by statute).

18. Moreover, because a utility is entitled to manage its own business, the PSC is barred from issuing orders that encroach on these matters. "It must be kept in mind that the commission's authority to regulate does not include the right to dictate the manner in which the

company shall conduct its business." Bonacker at 899. The Commission has the power to monitor and oversee, but not to manage. "Those powers are purely regulatory. The dominating purpose of the Public Service Commission was to promote the public welfare. To that end the statutes provided regulation which seeks to correct the abuse of any property right of a public utility, not to direct its use." Harline, 343 S.W.2d at 181 (Mo. App. K.C. 1960) (original emphasis).

19. The Rule contradicts this statutory purpose. Because the Rule now requires electric utilities to obtain a CCN prior to operating any electric plant or related gas transmission line, the Commission would be directing a utility how to conduct its business when it runs the facilities that it owns. The exercise of such power "would involve a property right in the utility. The law has conferred no such power upon the Commission." Id. Even considering the Commission's broad authority over public utilities, the Court of Appeals has held that the PSC's powers do not "clothe the Commission with the general power of management incident to ownership." Id. at 182.[3] This is especially true with regard to the powers of Section 393.170 which relate exclusively to granting CCNs before a utility begins construction and exercises a right or privilege under a franchise.

20. The ability of Missouri public utilities to operate electric generating plants that they have acquired in a timely and efficient manner without having to obtain a CCN or other approval from the Commission has served the public well. The PSC has encountered no difficulty in reviewing the prudence of such decisions and determining how they should be reflected in rates. For example, as GMO and its predecessor Aquila, Inc. analyzed their resource

[3] The Harline Court relied on both Missouri and federal decisions, including State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n of Missouri, 262 U.S. 276, 289 (1923), which stated: "It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."

options at length during the past decade, they determined that the 300 MW Crossroads Energy Center, at the time a merchant plant owned by a non-regulated affiliate, was the lowest cost option for meeting their requirements. See Report & Order at 78-85, In re Application of KCP&L Greater Mo. Operations Co. for Approval to Make Certain Changes in its Charges for Electric Service, No. ER-2010-0358 (May 4, 2011), aff'd, State ex rel. KCP&L Greater Mo. Operations Co. v. PSC, 408 S.W.3d 153, 162-63 (Mo. App. W.D. 2013). After Great Plains Energy Incorporated acquired Aquila in 2008, the Crossroads unit was transferred to the regulated books of GMO. Id., Report & Order at 85. In GMO's 2010 general rate case, the Commission thoroughly reviewed the resource planning process that GMO had conducted and concluded that the decision to add Crossroads to its generating fleet was "prudent and reasonable." Id. at 99.

21. Moreover, any attempt to apply Section 393.170.2 regarding the *exercise of a right* under a franchise to the *operation of an asset* would disrupt today's comprehensive process of evaluating utility supply options in the Integrated Resource Planning ("IRP") framework under Chapter 22 of the Commission's regulations. See Comments of KCP&L's Burton Crawford, Rulemaking Hearing, Vol. 1 at 35-37, In re Proposed Amendments to 4 CSR 240-3.105 Filing Requirements for Elec. Util. Applications for Certificates of Convenience and Necessity, No. EX-2015-0225 (May 12, 2016) ("2016 Hearing"). Requiring an electric utility to obtain a CCN to operate an asset, in addition to the IRP process and the ultimate rate case proceeding that evaluates the prudence of the utility's decision and sets rates, would impose an additional set of requirements for an electric utility to meet without any statutory authority or corresponding benefit to customers.

22. The Companies previously objected to the PSC's proposal to burden existing procedures with additional layers of bureaucracy that would have required a utility to obtain a CCN prior to acquiring a utility asset. See Proposed Amendment to 4 CSR 240-3.105(2)(D), In re Proposed Amendments to 4 CSR 240-3.105 Filing Requirements for Elec. Util. Applications for Certificates of Convenience and Necessity, No. EX-2015-0225 (Jan. 22, 2016). As KCP&L's director of resource management, Mr. Crawford stated in that proceeding that the Commission's proposal would likely add at least seven to eight months to current asset purchase timetables, given that CCN proceedings are not governed by an operation-of-law date, and will result in more costs for customers. See 2016 Hearing 36-37.[4]

23. With its action in this proceeding to create a new Subsection 2 area CCN to operate an asset, the PSC has now introduced a 4-tier approval process to build infrastructure: (1) The Chapter 22 IRP regulations that require utilities to develop resource strategies over a 20-year planning horizon; (2) The traditional line CCN to construct a plant under Subsection 1 of Section 393.170; (3) An area CCN to operate a plant under Subsection 2, as proposed in the Rule; and (4) The rate case proceeding that will determine whether the plant is allowed into rate base and the costs that the utility will recover in rates.

24. The Rule creates even greater uncertainty because an electric utility would be required to consider the possibility that an "operational CCN" under Section 393.170.2 might not be granted by the PSC after it acquired a generating plant or after it had received permission to construct a plant under Section 393.170.1. Clearly, the Rule goes far beyond the language and

[4] "[Y]ou're really tying the hands of utility management to make timely decisions where there's already the IRP process to review these decisions, there's already the rate case where it's already going to be reviewed. There's really no sense in setting up a procedure to do this … a third time where you potentially are going to result in more cost for retail customers."

intent of Section 393.170 which contains no authority for the Commission to grant a CCN for an electric utility to operate a plant.

III. The Rule is Contrary to Section 393.170 which Does Not Grant the Commission Authority to Require a Public Utility to Obtain a CCN Prior to the Construction or Operation of an Electric Generating Plant or other Asset that is Not Located in Missouri

25. The Rule seeks to regulate the construction or operation of electric generating plants or a gas transmission line that facilitates the operation of such a plant that is located outside Missouri. The first subdivision of Section (1)(A) of the Rule defines "asset" to mean such an electric facility "that is expected to serve Missouri customers and be included in the rate base used to set their retail rates regardless of whether the item(s) to be constructed or operated is located … inside or outside Missouri." See § (1)(A)1, Rule.

26. However, there is nothing in Section 393.170 that extends the Commission's CCN authority to infrastructure not located in Missouri. While the PSC failed to recognize this principle in Section (1)(A)1, it did accept it in Section (1)(A)2 which properly limits the definition of "asset" to transmission and distribution plant that is outside the utility's service territory "but within Missouri."

27. Any effort by the Rule to extend the jurisdiction of the Commission beyond Missouri violates other provisions of the Public Service Commission Law and is contrary to longstanding federal and state judicial precedents.

A. Missouri Law and Precedent

28. The General Assembly established the "jurisdiction, supervision, powers and duties" of the Commission in Section 386.250. It stated explicitly in four subsections that jurisdiction "shall extend" to gas and electricity operations "within the state"; to telecommunications facilities and services "within this state"; to water corporations, and their

property and operations "within this state"; and to sewer systems and their operations "within this state." See § 386.250(1)-(4).

29. This restriction of Commission authority to operations within Missouri is consistent with Section 386.030 which states: "Neither this chapter, nor any provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except as permitted under the provisions of the Constitution of the United States or the acts of Congress [emphasis added]."

30. The intent of the General Assembly to maintain and preserve the language of these statutes was made clear in 2007 when Section 386.210 was amended. In authorizing the PSC to enter into agreements or contracts with the public utility commissions of other states, the Legislature declared that the Commission may do so if they are "in the interest of the state of Missouri and the citizens thereof, for the purpose of carrying out its duties pursuant to section 386.250 as limited and supplemented by section 386.030 …." See § 386.210(6) [emphasis added].

31. Consistent with this statutory authority, the Commission has routinely allowed out-of-state facilities to come into rate base without even a suggestion that a CCN was required. For example, KCP&L did not apply for a CCN before the construction of the 100 MW Spearville Wind Energy Project in western Kansas. This facility was placed in service in September 2006 and was included in rate base with the Commission Staff's concurrence in KCP&L's 2006 general rate case. See True-Up Direct Testimony of David W. Elliott at 1-3, In re Kansas City Power & Light Co., No. ER-2006-0314 (Nov. 7, 2006); Staff Cost of Service Report at 4, 104, 137, In re Kansas City Power & Light Co., No. ER-2009-0089 (Feb. 11, 2009).

32. Similarly, GMO did not apply for a CCN before acquiring the Crossroads Energy Center, a four-unit combustion gas turbine facility located in Clarksdale, Mississippi. The PSC agreed that GMO's decision to add Crossroads to its generation portfolio was prudent and valued the plant for purposes of rate base. See Report & Order at 98-100, In re Application of KCP&L Greater Mo. Operations Co. for Approval to Make Certain Changes in its Charges for Elec. Serv., No. ER-2010-0358 (May 4, 2011), aff'd State ex rel. KCP&L Greater Mo. Operations Co. v. PSC, 408 S.W.3d 153 (Mo. App. W.D. 2013). While the parties disagreed on other issues, no one suggested that GMO should have obtained a CCN for Crossroads prior to acquiring it, or that GMO's predecessor Aquila, Inc. should have obtained a CCN prior to arranging for its construction.

33. The Commission's actions throughout its history have been consistent with the view that Section 393.170 does not apply to electric utilities' out-of-state projects. When the Wolf Creek nuclear generating plant in Coffey County, Kansas was nearing completion in 1985, the Commission adopted the joint recommendation of Staff and KCP&L regarding the plant's in-service criteria, and thereafter received Staff's report that the plant had complied with those criteria. See Report & Order, In re Kansas City Power & Light Co., 1986 WL 1301283 at *11 (Mo. P.S.C. 1986). As it considered KCP&L's request to place Wolf Creek into rate base, the PSC noted the long history of planning for the plant, including how it would operate with KCP&L's other plants, including Units 1 and 2 at the LaCygne generating station in Linn County, Kansas. Id. at *52-54, *114-16.

34. When the Commission summarized the legal principles it would apply to the request to place Wolf Creek in rate base, it expressed full confidence in its ability to "consider all facts" in assessing the prudence of KCP&L's conduct and the costs that it incurred. Id. at *50-53.

In an exhaustive opinion, the PSC allowed $798,846,000 into rate base out of a requested $924,812,000, a disallowance of approximately 14%. Id. at *49-50, *166. There was no suggestion by any of the parties who litigated this complex case that the Commission had overlooked its power to deny Wolf Creek a CCN or that its analysis of the prudence issues was affected by the PSC's lack of authority to grant a CCN to the project.

35. In a similar vein, when Missouri Public Service Company ("MoPub"), one of GMO's corporate predecessors, sought to recover costs related to the operations of the Jeffrey Energy Center near St. Marys, Kansas, there was no discussion by the Commission that it had never granted MoPub a CCN to operate the out-of-state plant or that the utility was operating without the requisite legal authority. See Report & Order, In re Mo. Pub. Serv. Co., 1982 Mo. PSC LEXIS 136 *47-51, No. ER-82-39 (1982).

36. The Commission has accorded similar treatment to other Missouri utilities' out-of-state facilities, such as Empire District Electric Company's Riverton Unit 12 in Kansas[5] and its ownership share in the Plum Point generating station in Arkansas,[6] as well as to Ameren's ownership of a variety of gas combustion turbine units in Illinois.[7] Given that Missouri courts should refrain from novel interpretations of longstanding Commission policies under State ex rel. Jackson County v. PSC, 532 S.W.2d 20, 29 (Mo. en banc 1975), the PSC itself should refrain from a radical shift in its longstanding interpretation of Section 393.170 in the absence of a legislative amendment.

[5] Order Approving Stipulation & Agreement at 2-3, In re Empire Dist. Elec. Co. Request for Auth. to Implement a Gen'l Rate Increase, No. ER-2016-0023 (Aug. 10, 2016).

[6] Order Approving Unanimous Stipulation at 2, In re Empire Dist. Elec. Co. for Auth. to File Tariff Increasing Rates, No. ER-2010-0130 (May 19, 2010).

[7] Report & Order at 59-67, In re Union Elec. Co. d/b/a/ AmerenUE's Tariffs Increasing Rates for Elec. Serv., No. ER-2007-0002 (May 22, 2007), aff'd, State ex rel. Pub. Counsel v. PSC, 274 S.W.3d 569, 577-80 (Mo. App. W.D. 2009).

37. This unbroken line of decisions by the Commission since its creation is consistent with United States Supreme Court precedent that a state's authority stops at its borders. "It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State … without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) ("State Farm"), quoting New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914). State Farm dealt with a calculation of punitive damages which the plaintiff alleged were necessary to rebuke State Farm for its "nationwide activities" beyond the jurisdiction of the state court in Utah where the trial occurred. State Farm, 538 U.S. at 420. In holding that a state cannot punish a defendant for conduct that was lawful where it occurred, the Court declared: "Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States." Id., quoting Huntington v. Attrill, 146 U.S. 657, 669 (1892).

38. Although the interpretation of a statute by an agency charged with its administration may be entitled to great weight, the Commission must interpret the law correctly when promulgating regulations. State ex rel. Office of Public Counsel v. PSC, 331 S.W.3d 677, 684 (Mo. App. W.D. 2011). Because neither Section 393.170 nor any other provision of the Public Service Commission Law requires an electric utility to obtain a CCN when it proposes to construct or operate a non-Missouri plant, "the language is clear and unambiguous," and there is

no need for statutory construction. Turner v. School Dist., 318 S.W.3d 660, 669 (Mo. en banc 2010).

39. If there were any ambiguity, the fact that for decades parties have conducted themselves consistent with the principle that Missouri law does not require CCN's for out-of-state plants or operations demonstrates the false premise on which the Rule rests. See Missouri PSC v. Union Elec. Co., 2018 WL 3235705 at *6 (Mo. en banc 2018), rehearing denied (Aug. 20, 2018), citing Landau v. Laughren, 357 S.W.2d 74, 80 (Mo. 1962).

B. Federal Cases from Other States

40. The extraterritorial nature of the Rule would likely violate the dormant Commerce Clause of the U.S. Constitution. Such a violation occurred in North Dakota v. Heydinger, 15 F. Supp. 3d 891, 897-98, 910-19 (D. Minn. 2014) ("Heydinger"), where Minnesota's New Generation Energy Act prohibited power sales from outside the state that would contribute to carbon dioxide emissions. State law that has an "extraterritorial reach" by having "the practical effect of controlling conduct beyond the boundaries of the state" is per se invalid under the dormant Commerce Clause. Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995), citing Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989). In the Minnesota case, the District Court found that the state statute violated the extraterritorial doctrine by requiring businesses to conduct their "out-of-state commerce in a certain way." Heydinger, 15 F. Supp. 3d at 911-12, 918. It additionally held that actions by regulatory agencies, such as the Minnesota Public Utilities Commission, to enforce such extraterritorial provisions violated the Commerce Clause. Id. at 918-19.

41. In affirming the District Court's opinion, the Court of Appeals for the Eighth Circuit agreed that the Minnesota statute violated the Commerce Clause because of its

extraterritorial reach. North Dakota v. Heydinger, 825 F.3d 912, 919-22 (8th Cir. 2016). The Eighth Circuit stated that the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." Id. at 919 (citations omitted). A statute or a regulation that "has undue exterritorial reach" is per se invalid when it "requires people or businesses to conduct their out-of-state commerce in a certain way." Id., citing Cotto Waxo, 46 F.3d at 793. "Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 582 (1986).

42. In the Heydinger litigation, the Eighth Circuit found that "the challenged prohibitions apply to non-Minnesota utilities" and were unlawful. Heydinger v. North Dakota, 825 F.3d at 921. This is similar to the reach of the Rule which would require Missouri electric utilities to apply for CCN's if they wish to operate or construct a non-Missouri facility. Such an extraterritorial reach would violate the Commerce Clause.

43. Similar efforts by states to control commerce beyond their borders have also been struck down. See Hughes v. Talen Energy Mktg, LLC, 136 S. Ct. 1288, 1297-99 (2016) (Federal Power Act preempts Maryland PSC order directing utilities to enter into contracts with new generating plants where FERC had approved PJM's wholesale electricity capacity auction to address resource adequacy issues); New Jersey Bd. of Pub. Util. v. FERC, 744 F.3d 74, 95-102 (3d Cir. 2014) (upholding FERC's elimination of generation exemptions granted by the New Jersey and Maryland Commissions regarding PJM capacity markets).

IV. The Rule is Contrary to Section 393.170 which Does Not Grant the Commission Authority to Require a Public Utility to Obtain a CCN Prior to the Improvement, Retrofit or Rebuild of an Electric Generating Plant or other Asset, or the Construction of a Plant where a Multi-unit CCN was previously Granted and timely Exercised

A. The Rule Exceeds the Authority of Section 393.170

44. There is nothing in Section 393.170 that gives the Commission authority over an electric utility that improves, retrofits, or rebuilds an existing generating plant or other asset that has already been granted a CCN. This is true regardless of whether the increase in the utility's rate base resulting from the improvement, retrofit or rebuild is 10% or some other figure. Therefore, the Rule's definition of "Construction" in Section (1)(B)2 is not authorized by law.

45. There is also no requirement for a public utility to apply for a new or amended CCN when it wishes to construct a plant at a generating station that previously received a line certificate under Section 393.170 for multiple units and the first unit was built within two years from its issuance. This proposition is reflected by the Commission's 2011 decision to allow Iatan 2 into rate base, years after a CCN was granted to the multi-unit Iatan Generating Station in 1973, and after Iatan 1 was constructed and included in KCP&L's rate base. See Report & Order at 20-77, In re Kansas City Power & Light Co., No. ER-2010-0355 (2011); Report & Order, In re Application of Kansas City Power & Light Co. and St. Joseph Light & Power Co. for Certificates of Pub. Convenience and Necessity to Construct an Elec. Generation Station in Platte County, Mo., No. 17,895 (1973). However, Section (1)(B)1 of the Rule would now require an electric utility to seek a line CCN under Section 393.170.1 when it wishes to construct an asset, regardless of whether the generating station where it would be built has been granted a CCN for multiple units.

46. Section 393.170.1 declares that no electrical corporation or other public utility "shall begin construction of" a plant "without first having obtained the permission and approval

of the Commission." Once that permission has been obtained with a CCN, construction may begin. As long as the authority conferred by the CCN is "exercised within a period of two years from the grant thereof," as provided in Section 393.170.3, there is no requirement for a public utility to return to the Commission for any additional or supplemental CCN authority.

47. The Commission has never disputed this proposition. In recent years the PSC has reviewed expenditures amounting to hundreds of millions of dollars by a number of Missouri utilities to bring their generating units into compliance with environmental regulations, as well as to improve their operations and efficiency. There was never a suggestion by the Commission or by any of the parties to these proceedings that an additional CCN was required before an air quality control system, selective catalytic reduction system, or other environmental control equipment became operational. See In re Kansas City Power & Light Co., Report & Order at 59-64, No. ER-2014-0370 (2015) (La Cygne Units 1 and 2); In re Ameren Missouri, Report & Order at 24-35, No. ER-2011-0028 (2011) (Sioux Units 1 and 2); In re Kansas City Power & Light Co., Order Approving Non-Unanimous Stipulations and Agreements, No. ER-2009-0089 (2009) (Iatan Unit 1).

48. In the case of the La Cygne generating station, less than three years ago in a comprehensive rate case proceeding the Commission, its Staff and other parties undertook a thorough study of the $1.23 billion environmental retrofit project that successfully brought the station's two units into compliance with a variety of federal and state standards. In re Kansas City Power & Light Co., Report & Order at 59-60, No. ER-2014-0370 (2015). The PSC noted the "multi-faceted analysis of a series of alternative long-term resource plans" that KCP&L conducted to assess whether to proceed with the retrofits. Id. at 60.

49. The plans to extend the lives of these units were thoroughly discussed and evaluated in the Commission's IRP process, as set forth in the detailed regulations contained in 4 CSR 240-22. These regulations declare:

> The fundamental objective of the resource planning process at electric utilities shall be to provide the public with energy services that are safe, reliable, and efficient, at just and reasonable rates, in compliance with all legal mandates, and in a manner that serves the public interest and is consistent with state energy and environmental policies. [4 CSR 240-22.010(2)]

50. Although a utility's compliance with these rules "shall not be construed to result in Commission approval of the utility's resource plans, resource acquisition strategies, or investment decisions" under 4 CSR 240-22.010(1), the Commission considered this evidence in finding that KCP&L's decision was prudent. It specifically found that "KCPL re-evaluated whether it was appropriate to retrofit the La Cygne units on four occasions, once each in 2012, 2013, 2014 and 2015, as part of KCPL's integrated resource planning ('IRP') process." Id. at 62, ¶ 146. It concluded that KCP&L's chief witness on this subject, "Burton Crawford testified credibly that the results of each re-evaluation of the La Cygne analysis during the IRP processes demonstrated that continuing with the retrofit project resulted in lower overall costs than resource plans that included retiring those units." Id, ¶ 147.

51. The Commission determined that KCP&L "met its burden" to demonstrate that its decisions were "prudent in proceeding with the La Cygne environmental retrofit project" and permitted over $292 million in costs to be included in rate base. Id. at 64. There is no evidence that the PSC was hindered in its ability the examine the critical facts. There was no suggestion either that a CCN under Section 393.170 should have been obtained before construction on the retrofit began, or that the IRP and rate case process was lacking in any way.

52. The Rule's definition of "Construction" in Section (1)(B)1 and (B)2 exceeds the authority of Section 393.170 and unlawfully injects the Commission into a public utility's

strategic and business decisions. As discussed above, the state may regulate public utilities, but it "is not clothed with a general power of management incident to ownership." State ex rel. Southwestern Bell Tel. Co. v. PSC, 262 U.S. 276, 289 (1923). The Missouri Supreme Court has stated that "the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." State ex rel. Kansas City Transit, Inc. v. PSC, 406 S.W.2d 5,11 (Mo. en banc 1966). While other states may occupy a more intrusive role in public utility regulation, Missouri has steadfastly adhered to the proposition that the "PSC is a creature of statute and limited thereby." State ex rel. Mo. Cable Telecomm. Ass'n v. PSC, 929 S.W.2d 768, 772 (Mo. App. W.D. 1996).

53. When the Court of Appeals concluded that a public utility was required by Section 393.170 to obtain a CCN prior to constructing a generating unit and a substation within its service area, it attempted to determine if "practices in other states" could provide guidance as far as "particular trends" regarding regulatory approval of new plants. See StopAquila.org v. Aquila, Inc., 180 S.W.3d 24. 38 (Mo. App. W.D. 2005) ("Aquila"). However, it found no guidance. The Aquila Court noted, for example, that in California "where seismic activity is rife, every electric plant construction or modification project of a certain size must be approved by that state's Commission …." Id. (emphasis added). Section 393.170 gives the Commission no authority over "modifications," improvements, retrofits, or rebuilds of plants or other projects.

54. In Iowa the has legislature specifically stated: "Any significant alteration, as determined by the [Iowa Utilities Board], in the location, construction, maintenance, or operation of a facility … shall require an application for an amendment to a certificate or a certificate whichever is appropriate." See § 476A.2, Subsection 2, Iowa Code (2018) (emphasis added). Missouri, by contrast, has no statutory language providing that a "significant alteration" to a

generating unit or facility authorizes or requires the Commission to issue a new or amended CCN.

55. The Aquila Court concluded that because "public utility laws vary so widely," it must return to Missouri law "where we began, with section 393.170.1" and its "plain and unambiguous language." Id. at 38-39. That is what the Commission must do here.

56. Any attempt by the Commission through this rulemaking proceeding to stray from Missouri law and to attempt to enlarge its jurisdiction would be unlawful. "If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power." State ex rel. MoGas Pipeline, LLC v. PSC, 366 S.W.3d 493, 494-95 (Mo. en banc 2012).

B. The IRP Process is Comprehensive and Effective

57. The Commission's current regulations under Chapter 22 require that electric utilities periodically prepare and submit an extensive and thorough Integrated Resource Plan to meet the fundamental objective of providing the public "with energy services that are safe, reliable, and efficient, at just and reasonable rates, in compliance with all legal mandates." See 4 CSR 240-22.010(2). Compliance with this public policy goal requires regulated utilities to: "Consider and analyze demand-side resources, renewable energy and supply-side resources on an equivalent basis …." See 4 CSR 240-22-010(2)(A).

58. For a proposed IRP to be accepted, a utility must design and evaluate one or more alternate resource plans for review by Staff, as well as the Commission. See 4 CSR 240-22.060(1). The requirements that an electric utility must meet before beginning construction or adding a new generation resource are already comprehensive and require consideration of all alternatives. Some of the required considerations include the range of future load growth, cost of capital, changes in legal mandates, fuel prices, and siting and permitting costs and schedules for

new generation and generation-related transmission facilities. See 4 CSR 240-22.060(5)(A)-(E). They also include an assessment of the construction costs for new facilities, fixed operation and maintenance costs for new and existing generation facilities, purchased power availability, outage rates for new and existing facilities, and "[a]ny other uncertain factors that the utility determines may be critical to the performance of alternative resource plans." Id. at 22.060(5)(F)-(G), (I)-(J), (M).

59. As KCP&L witness Burton Crawford stated in comments to the Commission in an earlier CCN rulemaking proceeding, applying Section 393.170 to environmental retrofits like the La Cygne generating station could double the price of the equipment (e.g., $50 million to $100 million), add seven to eight months to the project's schedule, and create tighter deadlines as far as environmental compliance.[8]

60. Given the relatively efficient process that electric utilities follow today in their resource decisions, adding a new process not required by law that would increase costs and delay implementation is contrary to the public interest.

V. The Fiscal Note of the Rule Violates Section 536.205

61. Pursuant to Section 536.205, the Rule contains a Fiscal Note that estimates the compliance costs for affected private entities in a range of $0 to $100,000, based upon the Commission's premise that the "estimated life of the rule is 3 years." However, the Rule contains no limitation or "sunset" clause that terminates its requirements. There was no discussion at the hearing of June 19, 2018 indicating that the Commission intended that the Rule would only be in effect for three years.

[8] Comments of Burton Crawford, Rulemaking Hearing, Vol. 1 at 33-35, In re Proposed Amendments to 4 CSR 240-3.105 Filing Requirements for Elec. Util. Applications for Certificates of Convenience and Necessity, No. EX-2015-0225 (May 12, 2016).

62. To the contrary, its introductory "Purpose" statement advises that the Rule "outlines the requirements for applications … pursuant to section 393.170.1 and 393.170.2, RSMo, requesting that the commission grant a certificate of convenience and necessity …." There is no reference to how long the requirements will be in effect.

63. The current CCN rule that the PSC proposes to rescind, 4 CSR 240-3.105, has been in existence since 2000, with a revision that became effective in 2003. Its "Purpose" statement also advises that applications "requesting that the commission grant a certificate of convenience and necessity must meet the requirements of this rule." It, too, contains no reference to its duration. Given their similar purpose, and the fact that the current Rule has been in effect for almost twenty years, it is logical to assume that the Rule proposed by the Commission will exist for a substantial period of time. Consequently, the Fiscal Note's "assumption" that the Rule will be in effect for an estimated three years has no basis and violates Section 536.205.1(3) which requires that compliance costs be estimated "in the aggregate."

64. Where a proposed rule "requires periodic compliance expenditures," such as proposed Rule that requires an electric utility to obtain a CCN whenever it wishes to operate or construct an asset under Section (2)(A), "the agency should attempt to estimate the cost of compliance in the aggregate for the foreseeable future." Missouri Hosp. Ass'n v. Air Conservation Comm'n, 874 S.W.2d 380, 390 (Mo. App. W.D. 1994). "These requirements are not trivial. They are necessary to ensure that any agency proposing a rule adequately considers the private and public entities it will affect." Id. at 391. This includes the agency "think[ing] about the economic consequences of its rulemaking." Id. (citation omitted).

65. The failure of the Rule to provide an "estimate in the aggregate as to the cost of compliance with the rule" under Section 536.205.1(3) renders the entire Rule "void and of no

force and effect." See § 536.205.2. Missouri has strictly enforced this statute and its public entity counterpart in Section 536.200.3, declaring that they "mean exactly what they say: rules adopted in violation of their mandates are void and of no force or effect." Missouri Hosp. Ass'n v. Air Conservation Comm'n, 874 S.W.2d 380, 392 (Mo. App. W.D. 1994).

66. Section III ("Worksheet") of the Fiscal Note appears to assert that the only two entities that will be affected by "the requirement to obtain a CCN for an asset located outside Missouri" of the Rule's Section (A)(1)1 are "[t]wo affiliated investor-owned utilities." The reference is clearly to KCP&L and GMO, as is the Fiscal Note's statement that the impact of Section (A)(1)1 on the Companies is between zero and $100,000.

67. There is no basis for this estimate given that KCP&L has retail service territory in the State of Kansas and may choose in the future to construct or operate a generating plant in that state, especially given the low-cost, high-capacity wind resources of western Kansas. Under the Rule such construction or operation would require KCP&L to apply for a CCN from the Commission. On June 4, 2018, the Companies' former holding company (Great Plains Energy Incorporated) merged with Westar Energy, Inc. ("Westar"), a Kansas regulated public utility, to form Evergy, Inc. ("Evergy"). Given that KCP&L, GMO and Westar are now public utility subsidiaries of Evergy, it is even more likely that KCP&L and GMO will work with their affiliate Westar to construct or operate assets in Kansas.

68. Other Missouri electric utilities may be affected as well. The Empire District Electric Company ("Empire") and Ameren Missouri currently own or operate generating plants and related facilities in Iowa, Illinois, Kansas, and Arkansas, as well as in Missouri. As each of their current Integrated Resource Plans contemplate additional wind resources, it is likely that they will choose to own or operate plants that are not located in Missouri. See 2017 Ameren

Missouri Integrated Resource Plan, Exec. Summary at 3 ("By the end of 2020, the plan includes the addition of at least 700 MW of wind generation, using American-made turbines, located in Missouri and neighboring states [emphasis added]."); 2016 Empire Integrated Resource Plan at 33-34.

69. Given the contested nature of CCN proceedings before the Commission and in the appellate courts over the past ten to fifteen years,[9] there is no basis to believe that the total costs to comply with the Rule in the aggregate would not exceed $100,000.

70. The Fiscal Note is also deficient because in Section III it speculates that the 10% rate base threshold in the Rule's Section (1)(B)2 definition of "construction" regarding retrofits will never be reached. It bases this assumption on an unfounded assertion that with "this [10%] limitation, only one project over the past several years would have required a CCN."

71. Within the past nine years environmental retrofit projects have added more than 10% to the rate bases of the Companies on three occasions: (1) the environmental retrofits to Units 1 and 2 of the La Cygne Generating Station that were placed in service in 2015 for KCP&L; (2) the environmental retrofit to Unit 1 at the Iatan Generating Station that was placed in service in 2009 for KCP&L; and (3) the Iatan 1 environmental retrofit that was also placed in service in 2009 for GMO's SJLP division.[10]

[9] Grain Belt Express Clean Line LLC v. PSC, 2018 WL 3432778 (Mo. en banc 2018); In re Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. App. W.D. 2017); State ex rel. Cass County v. PSC, 259 S.W.3d 544 (Mo. App. W.D. 2008); StopAquila.org v. Aquila, Inc., 180 S.W.3d 24 (Mo. App. W.D. 2005).

[10] GMO's predecessor Aquila, Inc., then known at UtiliCorp United, acquired St. Joseph Light & Power Co. ("SJLP") in 2000 which was a co-owner of the Iatan 1 Unit. See Report & Order at 43-47, In re Joint Application of UtiliCorp United Inc. and St. Joseph Light & Power Co. for Authority to Merge, No. EM-2000-292 (Dec. 14, 2000). The rate base of SJLP was maintained separately for a number of years. See State ex rel. KCP&L Greater Mo. Operations Co. v. PSC, 408 S.W.3d 153, 157-58 (Mo. App. W.D. 2013). In 2016 the SJLP rate base was consolidated with GMO's other rate base known as MPS. The Commission's Order Approving Stipulations & Agreements, In re KCP&L Greater Mo. Operations Co. Request for Auth. to Implement a Gen'l Rate Increase, No. ER-2016-0156 (Sept. 28, 2016), approved a Non-Unanimous Stipulation & Agreement that included "the consolidation of the MPS and SJLP rate districts into a common GMO-wide rate structure." Id., Non-Unanimous Stipulation & Agreement, § 11(1) (filed Sept. 20, 2016).

72. Despite these facts, the Rule concludes that with the 10% rate base limitation, "the fiscal impact of this provision is deemed minimal," and it provides no cost estimate whatsoever. This failure of the Rule to provide an "estimate in the aggregate as to the cost of compliance" violates Section 536.205.1(3).

VI. Conclusion

73. Key provisions of the Final Rule are clearly unlawful. They are a misguided effort to stretch Section 393.170 beyond its clear and simple language. The General Assembly has granted the Commission extensive powers in Chapters 386 and 393 to oversee and regulate Missouri's electric utilities. However, the PSC "is merely the instrumentality of the Legislature" which "alone has the power to declare the general law relating to" regulatory subjects. "If the interests of the public require a change in the law …, then it is a matter for appropriate action by the Legislature …." State ex rel. Springfield Warehouse & Transfer Co. v. PSC , 225 S.W.2d 792, 795 (Mo. App. K.C. 1949). See Tetzner v. Department of Social Services, 446 S.W.3d 689, 692 (Mo. App. W.D. 2014) ("a basic tenet of administrative law" is that "an agency only has such jurisdiction that may be granted by the legislature").

74. Section 393.170 contains no direction to the Commission to issue rules, unlike other provisions of the PSC Law.[11] The general authority of the Commission extends under Section 386.250(6) only to "the adoption of rules as are supported by evidence as to reasonableness." However, significant parts of the Rule go well beyond the language of Section 393.170 and constitute de facto legislation far beyond any reasonableness standard.

[11] See § 386.266.9 (fuel adjustment and rate adjustment mechanisms). Section 393.140(11) "empowers the PSC to establish rules and regulations relating to any rate change in a utility's schedule." State ex rel. Office of the Public Counsel v. PSC, 331 S.W.3d 677, 687 n.10 (Mo. App. W.D. 2011). No provision of Section 393.170 relates to rate schedules.

75. Moreover, the proposal attempts to provide a bureaucratic "solution" to an electricity resource adequacy problem that does not exist in Missouri. Over the years the Commission has wisely exercised its powers by not imposing onerous rules that infringe on the right and responsibility of electric utilities to manage their business. As a result, Missouri has not and does not face the resource adequacy shortfalls and other capacity problems encountered by other states whose legislatures and commissions felt compelled to implement zero emission credit ("ZEC") proposals and other programs to attempt to address such issues. See Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 1294-97 (2016) (striking down Maryland PSC generation order designed to remedy supply shortfalls); Coalition for Competitive Elec. v. Zibelman, 272 F. Supp. 3d 554, 560-63 (S.D.N.Y. 2017) (upholding N.Y. PSC ZEC program), appeal docketed, No. 17-2654 (2d Cir., Aug. 25, 2017); Village of Old Mill Creek v. Star, 2017 WL 3008289 (N.D. Ill. 2017) (upholding Illinois ZEC statute), appeal docketed, No. 17-2433 (7th Cir., July 17, 2017).

76. Electric utilities should be excused from incurring the expense of complying with the Rule until the significant legal and policy issues discussed above are resolved. The Commission should, therefore, exercise its discretion under Section 386.500.3 and stay the effectiveness of the Rule indefinitely until further consideration is given to these matters. There is simply no need for those provisions of the Rule discussed above which, if adopted, will hinder the ability of Missouri electric utilities to construct and operate infrastructure in a cost-effective and timely manner.

WHEREFORE, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company request that the Commission grant rehearing regarding its August 8, 2018 Final Order of Rulemaking, and upon rehearing issue a new Order of Rulemaking consistent

with this Application. The Companies additionally request that the Commission stay the effectiveness of its Final Order of Rulemaking until such time as the issues identified in this Application can be reheard and resolved in a manner consistent with the language and intent of Section 393.170 and other provisions of the Public Service Commission Law.

Respectfully submitted,

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VERIFICATION

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Darrin R. Ives, being first duly sworn, on his oath and in his capacity as Vice President—Regulatory Affairs, states that he is authorized to execute on behalf of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company this Application for Rehearing and Request for Stay, and has knowledge of the matters stated in this application, and that said matters are true and correct to the best of his knowledge and belief.

Darrin R. Ives

Subscribed and sworn to before me this 5th day of September 2018

Notary Public

My Commission Expires: 4/26/2021

ANTHONY R WESTENKIRCHNER
Notary Public, Notary Seal
State of Missouri
Platte County
Commission # 17279952
My Commission Expires April 26, 2021

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed or mailed, postage prepaid, this 5th day of September, 2018 to all counsel of record in this case.

/s/ Robert J. Hack

Attorney for Kansas City Power & Light Company
and KCP&L Greater Missouri Operations Company